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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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AUG 25 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MB Docket No. 03-13
Table of Allotments,	)	RM-10628
FM Broadcast Stations.	)	
(Marion and Johnston City, Illinois)	)	

To: The Commission

APPLICATION FOR REVIEW

Infinity Broadcasting Operations, Inc. ("Infinity"), licensee of radio stations WBBM(AM), WBBM-FM, WSCR(AM), and WXRT-FM, Chicago, Illinois, WGN Continental Broadcasting Company ("WGN"), licensee of WGN(AM), Chicago, Illinois, and Bonneville International Corporation ("BIC"), operator of radio stations WNND(FM), WLUP-FM, and WDRV(FM), Chicago, Illinois, WTMX(FM), Skokie, Illinois and WWDV (FM), Zion, Illinois[1] (Infinity, WGN, and BIC, collectively referred to herein as "Joint Parties"), hereby seek Commission review of the Media Bureau ("Bureau") Report and Order released July 24, 2003 ("Order"),[2] which granted Clear Channel Broadcasting Licenses, Inc.'s ("Clear Channel") above-captioned requested reallotment of Channel 297B from Marion to Johnston City, Illinois.[3]

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[1] These five stations are licensed to Bonneville Holding Company, a BIC-affiliated company.

[2] *Marion and Johnston City, Illinois*, RM-10628, slip op. (MB, rel. July 24, 2003).

[3] *Id.*

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Consistent with the Commission's rules, this Application for Review seeks Commission reversal of the Bureau's action described above

In support whereof, the Joint Parties have separately filed an Application for Review of the related Media Bureau ("Bureau") letter ruling, also released July 24, 2003 ("Letter Ruling"),[4] which (1) granted Clear Channel's above-captioned major facilities change application (the "Application") and (2) dismissed InterMart Broadcasting of Georgia, Inc 's ("InterMart") above-captioned major facilities change application [5] As discussed and demonstrated therein, the grant of the Application and the grant of the above-captioned rulemaking are inextricably linked The Bureau's Letter Ruling and Order cross-reference each other and each is dependent on the findings of the other Therefore, to promote efficiency and conserve Commission resources, Joint Parties set out their arguments in support of the reversal of the Bureau's Letter Ruling and Order in the attached Application for Review, which is hereby incorporated by reference

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[4] *Clear Channel Broadcasting Licenses, Inc and InterMart Broadcasting of Georgia, Inc.*, Letter Ruling (MB, issued July 24, 2003)

[5] Joint Parties do not seek review of the dismissal of InterMart's application Joint Parties had sought the dismissal of InterMart's application for reasons essentially adopted in the Letter Ruling *See Clear Channel Broadcasting Licenses, Inc and InterMart Broadcasting of Georgia, Inc* , Letter from Joint Parties to Edward P DeLaHunt, Reference No 1800B3-TSN, at 2 (Feb 21, 2003) It appears that the staff has granted, with remarkable dispatch, a petition for reconsideration that InterMart filed with respect to the dismissal of its above-captioned application *See Public Notice*, Broadcast Actions, BMAP-20010719AAO (rel Aug. 19, 2003) InterMart failed to serve a copy of its petition on Joint Parties despite a clear obligation to do so under 47 C F R §§ 1 1202, 1 1208 (2002) and Joint Parties were unaware of the petition's existence prior to its grant Joint Parties reserve the right to address in a timely manner this extraordinary staff action

Conclusion

For the reasons set forth herein and in the attached Application for Review, incorporated by reference, Joint Parties respectfully request that the Commission rescind the Order

Respectfully submitted,

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August 25, 2003

CERTIFICATE OF SERVICE

I, Rebecca J. Cole, hereby certify that a copy of the foregoing "Application for Review" was mailed, first class postage prepaid, this 25th day of August, 2003 to the following

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matters of	)	
	)	
Application of	)	BMAP-20010719AAN
Clear Channel Broadcasting Licenses Inc	)	
For Major Modification to a	)	
Construction Permit	)	
Station WHTE(AM) Johnston City, Illinois	)	
(Facility ID # 87178)	)	
	)	
Application of	)	BMAP-20010719AAO
InterMart Broadcasting of Georgia, Inc	)	
For Major Modification to a	)	
Construction Permit	)	
Station WSWK(AM) Adel Georgia	)	
(Facility ID # 87118)	)	

To The Commission

APPLICATION FOR REVIEW

Infinity Broadcasting Operations Inc ("Infinity"), licensee of radio stations WBBM(AM) WBBM-FM WSCR(AM), and WXRT-FM, Chicago, Illinois WGN Continental Broadcasting Company ("WGN"), licensee of WGN(AM), Chicago, Illinois, and Bonneville International Corporation ("BIC"), operator of radio stations WNND(FM), WLUP-FM, and WDRV(FM), Chicago, Illinois, WTMX(FM), Skokie, Illinois and WWDV(FM), Zion, Illinois[1] (Infinity, WGN and BIC, collectively referred to herein as "Joint Parties"), hereby seek Commission review of the Media Bureau ("Bureau") letter ruling released July 24 2003 ("Letter Ruling") which (1) granted Clear Channel Broadcasting Licenses, Inc s ("Clear Channel")

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[1] These five stations are licensed to Bonneville Holding Company, a BIC-affiliated company

above-captioned major facilities change application (the "Application") and (2) dismissed InterMart Broadcasting of Georgia, Inc.'s ("InterMart") above-captioned major facilities change application.[2] Consistent with the Commission's rules, this Application for Review seeks Commission reversal of action (1) described above.[3] In support whereof the following is shown:

I. Background.

On July 19, 2001, Clear Channel and InterMart filed the above-captioned major modification applications. InterMart's proposed operation of WSWK is short-spaced to WHTE's current facilities. InterMart's application was therefore expressly contingent on the grant of Clear Channel's Application. On May 31, 2002, Joint Parties filed a Joint Petition to Deny Clear Channel's Application, on the basis that grant of the Application would lead to the loss of Johnston City's sole local radio transmission service in contravention of Section 307(b) of the Communications Act of 1934 and established Commission policy. In response, on June 12, 2002, Clear Channel filed a Petition for Rule Making seeking to amend the FM Table of Allotments to delete Channel 297B at Marion, Illinois and reallot the channel to Johnston City.

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[2] *Clear Channel Broadcasting Licenses, Inc. and InterMart Broadcasting of Georgia, Inc.*, Letter Ruling (MB, issued July 24, 2003). By a separate report and order released the same day, the Bureau granted Clear Channel's inextricably linked requested reallotment of Channel 297B from Marion to Johnston City, Illinois. *Marion and Johnston City, Illinois*, RM-10628, slip op. (MB, rel. July 24, 2003) ("Order") (Letter Ruling and Order collectively referred to herein as "Bureau Decisions").

[3] Joint Parties do not seek review of the dismissal of InterMart's application. Joint Parties had sought the dismissal of InterMart's application for reasons essentially adopted in the Letter Ruling. *See Clear Channel Broadcasting Licenses, Inc. and InterMart Broadcasting of Georgia, Inc.*, Letter from Joint Parties to Edward P. DeLaHunt, Reference No. 1800B3-TSN, at 2 (Feb. 21, 2003). It appears that the staff has granted, with remarkable dispatch, a petition for reconsideration that InterMart filed with respect to the dismissal of its above-captioned application. *See Public Notice*, Broadcast Actions, BMAP-20010719AAO (rel. Aug. 19, 2003). InterMart failed to serve a copy of its petition on Joint Parties despite a clear obligation to do so under 47 C.F.R. §§ 1.1202, 1.1208 (2002) and Joint Parties were unaware of the petition's existence prior to its grant. Joint Parties reserve the right to address in a timely manner this extraordinary staff action.

Illinois, and promising to file an application to modify the license of Marion station WDDD-FM accordingly upon grant of the Petition. On June 13, 2002, Clear Channel and InterMart filed separate Oppositions to Joint Parties' Petition to Deny. On June 25, 2002, Joint Parties submitted a Joint Reply to Opposition to Joint Petition to Deny, noting that Clear Channel's application had now become impermissibly contingent on the Bureau's grant of Clear Channel's June 12, 2002 rule making proposal. Joint Parties also demonstrated that Berwyn, the proposed community of license in Clear Channel's Application, was not sufficiently independent of its neighbor Chicago so as to warrant a first local service preference under the Commission's allotment priorities.

The Bureau subsequently released a January 15, 2003 Notice of Proposed Rulemaking seeking comment on Clear Channel's proposed Marion to Johnston City re-allotment. Clear Channel filed comments in support of, and Joint Parties filed comments opposing, the reallotment on March 10, 2003. Joint Parties argued that the reallotment would not advance the Commission's core allotment priorities and that grant of the allotment was impermissibly contingent on grant of the Application. Clear Channel filed Reply Comments on March 25, 2003.

II. The Commission Should Reverse the Bureau Decisions. They Contravene the Commission's Prohibition Against Contingent Applications.

In their Joint Petition to Deny the Application, Joint Parties brought to the Bureau's attention a matter of utmost importance, one that Clear Channel had glossed over – grant of the Application to relocate WHTE approximately 455 km, to a close-in suburb of Chicago, would effectively remove Johnston City's sole local transmission service. In granting Clear Channel's proposal, the Bureau agreed with the Joint Parties, recognizing that "it is reasonable to conclude that [grant of the Application] will likely result in the eventual loss of Johnston City's only local

transmission service."[4] As noted above, Clear Channel's response to this fatal deficiency, *after* the Joint Parties called it to the Commission's attention, was to interpose a new rule making petition seeking to reallot another Clear Channel station, WDDD-FM, from Marion, Illinois to Johnston City. In its Petition for Rule Making, Clear Channel asked that the Bureau treat Johnston City as if it were devoid of local service and, accordingly, consider the proposal as resulting in a preferential arrangement of allotments. Clear Channel needed the Bureau to ignore the fact that at the time of the filing, Johnston City was served by WDDD(AM) and its associated expanded band station WHTE(AM). Stated another way, the grantability of Clear Channel's rule making proposal was contingent on the grant of the Application, while the Application's grantability was contingent on grant of Clear Channel's rule making proposal. Without the grant of the rule making proposal, as noted in the Bureau's Letter Ruling, grant of the Application would effectively remove Johnston City's sole local transmission service in contravention of the Commission's allotment priorities.

Joint Parties once again timely and properly brought to light what Clear Channel had failed to acknowledge in its pleadings – this time that Clear Channel's two proposals were impermissibly contingent on one another. Joint Parties raised this argument at the earliest possible opportunity -- their Joint Reply to Opposition to Joint Petition to Deny -- because Clear Channel had not filed its contingent proposal until after (and indeed in response to) the Joint Petition to Deny.[5] In their reply, Joint Parties not only put the issue squarely before the Bureau, but cited case law directly on point to demonstrate that Clear Channel's now contingent

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[4] Letter Ruling at 8.

[5] The Joint Petition to Deny was submitted May 31, 2002, the contingent Petition for Rule Making was filed June 12, 2002, and the Joint Reply to Opposition to Joint Petition to Deny was submitted June 25, 2002.

application had run afoul of the Commission's prohibition of contingent applications

Despite the fact that Joint Parties unequivocally and timely raised the dispositive issue of the impermissibly contingent nature of Clear Channel's Application, the Letter Ruling *is silent on the issue*. This failure to address a key issue fatally undermines the Bureau's Letter Ruling. The D.C. Circuit has ruled that such lapses render the Bureau "intolerably mute."[1] That is, the Bureau is under an obligation to "supply a reasoned analysis" for its decision" and "must *articulate with clarity and precision its findings and the reasons for its decisions*."[2] In its Letter Ruling granting the Application, the Bureau failed to comply with this obligation and the Bureau decision must be reversed accordingly.

The Letter Ruling's glaring omission is inexplicable in the particular context of this proceeding, where the Bureau expressly relied *on Section 73.3517* of the Commission's Rules in support of its decision to return *the InterMart application* as inadvertently accepted for filing. In that portion of the Letter Ruling, the Bureau recognized that it could not grant the InterMart application because it was "contingent on the granting of" the Clear Channel Application and no exception applied. The Bureau went on to state that InterMart had not sufficiently demonstrated special circumstances justifying a waiver of the rule. The Bureau returned InterMart's

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[1] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.") (internal citations omitted); *see also PG & E Gas Transmission v. FERC*, 315 F.3d 383 (D.C. Cir. 2003) ("FERC's failure to come to terms with its own precedent reflects the absence of a reasoned decisionmaking process.").

[2] *Greater Boston Television Corp.*, 444 F.2d at 852.

WAIT Radio v. FCC, 418 F.2d 1153, 1156 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (citing *Permian Basin Rate Cases*, 390 U.S. 747, 792 (1968)).

application, therefore, as impermissibly contingent. This return of the InterMart application was clearly correct. Yet, the Bureau should also have recognized that it could not grant the Clear Channel Application either, because it is "contingent on the granting of" a later-filed rulemaking proposal. Ironically, the Bureau rightfully returned InterMart's application due to a contingency that InterMart was open and forthright about, while granting Clear Channel's Application despite its failure even to acknowledge the contingency.

In its Order, the Bureau again fails to give "reasoned consideration" to Joint Parties' arguments. The Bureau *cites no precedent* for its bald assertion that "Section 73.3517 of the Rules is limited to contingent applications and does not apply to related application and rulemaking proceedings."[9] The Bureau makes no attempt to reconcile its decision with its own contrary precedent, set forth below.

More than 40 years ago, the Commission recognized the pitfalls associated with contingent proposals.[10] The current contingent application rule, 47 C.F.R. 73.3517, concisely provides that: "Contingent applications for new stations and for changes in facilities of existing stations are not acceptable for filing." Although contingencies are permitted only very rarely in the application context, the use of contingent proposals is permitted somewhat more broadly in rulemakings – but only when the contingencies are submitted simultaneously in a petition for rule making or counterproposal that is substantially complete when filed.[11] The rulemaking

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[9] Order at para. 7.

[10] *Public Notice – Contingent Applications in the Broadcast Services*, 22 R.R. 299 (1961).

[11] *See Parker, Arizona*, 17 FCC Rcd 9578 (MB 2002). In the Order, the Bureau stated, "the Commission routinely allows allotment 'backfills' by existing stations to preserve local service." Order at para. 7. In a decision adopted by the Assistant Chief of the Audio Division on the same day that he adopted the Order, he notes: "the Commission determined that the 'backfill' practice was uncertain, time consuming and a potential cause of intractable spectrum entanglements." *Barnwell, South Carolina, and Pembroke, Douglas, Willacooche, Statesboro,*

context allows for additional flexibility because proposals are exposed to the light of public notice, comment, and counterproposal, allowing the Commission to more fully consider the public interest implications of a given proposal. Here, the Application proposed a change in WHTE's facilities even more far reaching than that proposed in a typical rule making, in an application context that does not allow for counterproposal. Under these circumstances, the Bureau should have insisted on strict compliance with all of the Commission's rules.[12] Grant of Clear Channel's proposals established new Commission precedent in an area of utmost importance to the public interest, premised on a contingency.

In a case directly on point, the Chief of the Audio Services Division returned as improperly accepted for filing an application that was contingent on a separate rule making proceeding. In the *Hearing Designation Order* in MM Docket No. 88-559, a Panama City, Florida radio proceeding, the ASD Chief dismissed an application that had requested a waiver for a short-spaced FM transmitter site. *A. P. Walter, Jr.*, 4 FCC Rcd 653 (1989). The dismissed applicant had argued that the grant of a channel upgrade to an existing broadcaster that was being sought in a separate rule making proceeding would eliminate both the short-spacing and the need for a waiver. *The Chief found the separate rule making to be a fatal contingency.* Just as in *A.P.*

Pulaski, East Dublin, Swainsboro and Twin City, Georgia, DA 03-1936 (rel. July 25, 2003), citing *Pacific Broadcasting of Missouri LLC*, 18 FCC Rcd 2291 (2003), *recon. pending*. In *Pacific Broadcasting of Missouri* the Commission itself noted that "Backfill allotments permit the filing of inherently contingent proposals, and create the potential for the type of problems and resource burdens that led to the codification of the Commission's general prohibition on filing contingent applications." *Pacific Broadcasting of Missouri*, 18 FCC Rcd at para. 14.

[12] Significantly, the Commission has exhibited a particular sensitivity to contingent applications involving the expanded AM band. Note 1 to Section 73.3517 provides that no application to move to the expanded band may be part of "contingent applications associated with a voluntary agreement." 47 C.F.R. § 73.3517 Note 1.

Walter, Jr., Clear Channel "would require [the Commission] to accept an application contingent upon a proposed Rule Making ... thus violating 47 C.F.R. 73.3517...." *Id.* at para. 6.

The Bureau has also rejected rule making proposals contingent on applications as violative of the contingent application rule. *Just three months ago*, the Bureau rejected a rule making proposal, which (as in the proposal now before the Commission) was contingent on the grant of an application. The Bureau in that case stated "We reject Joint Parties argument that its downgrade proposal complies with the contingent application procedures. [These procedures do] not authorize the filing of contingent rulemaking petitions."[13]

The confusion and mischief created when the Bureau strains to grant contingent proposals is evident in the Bureau Decisions themselves, which are predicated on a foundation of intangibles and indefinites. In the Order, the Bureau notes that it is granting the Marion to Johnston City allotment based on the "*high likelihood* that Petitioner will surrender the WDDD(AM) authorization in a number of years."[14] The Bureau concedes, however, that it has no way to require delivery of the public interest benefits it projects, that Clear Channel controls the Marion/Johnston City/Berwyn chessboard (e.g., Clear Channel ultimately decides whether to serve Johnston City or Berwyn). The Commission should not allow itself to be reduced to an oddsmaker assessing assumptions and likelihoods, as has happened here. What the Bureau describes as "relatively unusual circumstances"[15] really amount to nothing more than a "garden variety" impermissible contingency.

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[13] *Quanah, Archer City, Converse, Flatonia, Georgetown, Ingram, Keller, Knox City, Lakeway, Lago Vista, Llano, McQueeney, Nolanville, San Antonio, Seymour, Waco and Wellington, Texas and Ardmore, Durant, Elk City, Healdton, Lawton and Purcell, Oklahoma*, 18 FCC Rcd 9495, para. 5 (MB 2003).

[14] Order at para. 6 (emphasis added).

[15] *Id.*

It should also be noted that, in going to considerable lengths to grant Clear Channel's Application, the Bureau created yet another contingency. The Letter Ruling expressly conditioned "grant of the Clear Channel Application on the initiation of replacement radio broadcast service at Johnston City, not to include WDDD(AM) " Letter Ruling at 8 (citing to the Order) Likewise, the Order states that "In a separate action taken today, the staff grants the Berwyn Application In order to ensure an adequate level of service in Johnston City the WHTE construction permit includes a condition providing that operations of Station WHTE may not commence until a new local service is initiated at Johnston City " Order at para 7 In order to commence service at Johnston City Clear Channel needs to file an application Grant of the Application is therefore impermissibly contingent under Commission Rule 73 3517 on grant of that application necessary to commence service at Johnston City This new contingency -- one application contingent on another application -- is barred even under the Bureau's own flawed interpretation of Section 73 3517

The prohibition on contingent applications was meant to prevent the guesswork and wagering associated with contingent proposals and associated with Clear Channel's proposals in this instance The Bureau lost sight of this simple rule when it decided to grant Clear Channel's contingent Application Its decision should be rescinded

III. Conclusion

For all of the foregoing reasons, Joint Parties respectfully request that the Commission rescind the Letter Ruling.

Respectfully submitted

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August 25, 2003

CERTIFICATE OF SERVICE

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